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## Will Noncustodial Parents Who are Refused Visitation with Children Also Be Turned Away from U.S. Courts? Judicial Remedies in Access Cases Under the Hague Convention in *Cantor v. Cohen* and *Ozaltin v. Ozaltin*

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WILL NONCUSTODIAL PARENTS WHO ARE REFUSED  
VISITATION WITH CHILDREN ALSO BE TURNED AWAY FROM  
U.S. COURTS?: JUDICIAL REMEDIES IN ACCESS CASES  
UNDER THE HAGUE CONVENTION IN *CANTOR V. COHEN* AND  
*OZALTIN V. OZALTIN*

Melissa L. Thompson \*

I. INTRODUCTION

Six-year-old Anna grew up in Sweden, living under one roof with both of her parents, Lars and Natalie. After several weeks of arguing that kept Anna up late into the night, Natalie filed for divorce and was designated the “custodial parent.” From then on Anna spent half of the week with her mother, and the other half of the week with her father. When Natalie discovered Lars had begun dating, Natalie made a plan to move with Anna to the United States and to cut off contact with Lars. Natalie had friends in Chicago who agreed to host Natalie and Anna until Natalie was able to find a job. When Anna asked her mother why Lars was not making the trip with them, Natalie told her that he had found a new family and no longer loved them anymore. Natalie refused to allow Lars any contact with Anna, and within days of their arrival in the United States, Lars filed a petition for the return of Anna and flew to the United States in hopes of reestablishing contact with his daughter. Natalie prevented Lars from seeing Anna by concealing their location and hiding her with friends. When Lars filed a petition for enforcement of access to Anna based on the Swedish order providing for equal parenting time, his petition was dismissed. Lars was told that The Hague Convention did not protect his visitation rights and that he would have to await the federal court’s decision on his petition for Anna’s return. Left-behind parents, like Lars, who travel to the United States to seek the return of their child, may find rights of access established by their home country’s custody order difficult to enforce.

On February 11, 2013, the U.S. Court of Appeals for the Second Circuit decided *Ozaltin v. Ozaltin*, holding that the International Child Abduction Remedies Act (ICARA) creates a private right of action to enforce parental access rights provided for under The Hague Convention.<sup>1</sup> This decision conflicts with existing law of the Fourth Circuit established in *Cantor v. Cohen*, in which the Fourth Circuit held

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1. *Ozaltin v. Ozaltin*, 708 F.3d 355 (2d Cir. 2013).

that ICARA does not empower U.S. courts to hear parents' claims pursuing access rights.<sup>2</sup>

This Casenote examines the function of the Hague Convention where a foreign parent seeks to enforce parental rights of access in the United States under ICARA. Specifically, this discussion considers whether U.S. courts have subject matter jurisdiction to hear a parent's claim seeking to enforce rights of access in the U.S. pursuant to a foreign court's custody order granting that parent rights of access or whether the parent's only recourse is in state court under state visitation law. Part II proceeds with a brief overview of the history and underlying goals of the Hague Convention and introduces the concept of "access" claims under the Hague Convention and its relevant U.S. statutory provisions. Part III describes the divergent holdings of the Fourth and Second Circuit Courts of Appeals and recounts the courts' analyses. Part IV evaluates these decisions in light of legislative intent, statutory interpretation, separation of powers, and public policy concerns. Part V concludes that the decision of the Second Circuit should be adopted and recommends that all actions seeking to enforce access rights should proceed in federal court alongside actions seeking the child's return. Finally, this Casenote contends that the issue of private rights of action under ICARA is ripe for review by the U. S. Supreme Court.

## II. BACKGROUND

### *A. The History of the Hague Convention of 1980*

The Hague Convention of October 25, 1980 on the Civil Aspects of International Abduction (The Hague Convention)<sup>3</sup> is an international treaty, adopted by eighty-nine countries,<sup>4</sup> which seeks "to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and to ensure that rights of custody and of access

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2. Cantor v. Cohen, 442 F.3d 196 (4th Cir. 2006).

3. The Hague Convention originated from the Hague Conference on Private International Law, which sets out to "work for the progressive unification of the rules of private international law." See *Information on The Hague Convention Conference on Private International Law*, THE WORLD ORGANISATION FOR CROSS-BORDER CO-OPERATION IN CIVIL AND COMMERCIAL MATTERS, [http://www.hcch.net/index\\_en.php?act=text.display&tid=4](http://www.hcch.net/index_en.php?act=text.display&tid=4) (last visited July 15, 2013).

4. See *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: Members of the Organisation*, THE WORLD ORGANISATION FOR CROSS-BORDER CO-OPERATION IN CIVIL AND COMMERCIAL MATTERS, [http://www.hcch.net/index\\_en.php?act=conventions.statusprint&cid=24](http://www.hcch.net/index_en.php?act=conventions.statusprint&cid=24) (last visited July 15, 2013). The Hague Convention will likely soon have ninety contracting states, with Kazakhstan as the most recent signatory. 90 Contracting States for the 1980 Hague Child Abduction Convention after accession by Kazakhstan, THE WORLD ORGANISATION FOR CROSS-BORDER CO-OPERATION IN CIVIL AND COMMERCIAL MATTERS, [http://www.hcch.net/index\\_en.php?act=events.details&year=2013&varevent=312](http://www.hcch.net/index_en.php?act=events.details&year=2013&varevent=312) (last visited July 15, 2013).

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under the law of one Contracting State are effectively respected in the other Contracting States.”<sup>5</sup> The drafters of the Hague Convention sought to protect children from the harmful effects of international child abduction by noncustodial parents attempting to relocate in order to “establish artificial jurisdictional links”<sup>6</sup> to a perceived “friendlier forum.”<sup>7</sup>

The Hague Convention carries out its goal by instituting a policy of deference to foreign legal systems, thereby removing any perceived benefit of international child abduction to noncustodial parents.<sup>8</sup> Although it is undisputed that any proper custody determination must be based on the child’s best interests, the Hague Convention leaves this determination to the courts of the country of the child’s “habitual residence”<sup>9</sup> rather than to the courts of the country of refuge.<sup>10</sup> Therefore, a noncustodial parent who flees with the child to a contracting state of the Hague Convention will find that the “left-behind” parent can have the courts of the refuge country order the child returned to the home jurisdiction for a proper custody determination.<sup>11</sup> For this reason, the Hague Convention is best described as a “jurisdiction-selection treaty” because it governs only *where* custody determinations should be made without assessing the merits of the custody dispute.<sup>12</sup> In essence, the Hague Convention represents an

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5. The Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, 1343 U.N.T.S. 89 [hereinafter *The Hague Convention*].

6. Elisa Pérez-Vera, EXPLANATORY REPORT ON THE 1980 HAGUE CHILD ABDUCTION CONVENTION, ¶ 11 (1982), available at <http://www.hcch.net/upload/exp128.pdf> [hereinafter Pérez-Vera Report].

7. *Abbot v. Abbot*, 560 U.S. 1, 7 (2010); *The Hague Convention*, *supra* note 5, at pmbl.

8. *See The Hague Convention*, *supra* note 5, at arts. 1, 12; *see also* *Ozaltin v. Ozaltin*, 708 F.3d 355 (2d Cir. 2013).

9. The Hague Convention itself does not define “habitual residence,” but courts generally broadly consider factors regarding intent (including the purchase of a home, the moving of belongings, parental employment, and the location of bank accounts) and child acclimatization (child’s age, length of stay in the country, and school enrollment). For a full discussion of the various factors considered in a “habitual residence” determination, see Jeff Atkinson, *The Meaning of “Habitual Residence” Under The Hague Convention on the Civil Aspects of International Child Abduction and The Hague Convention on the Protection of Children*, 63 OKLA. L. REV. 647 (2011).

10. *Abbott*, 560 U.S. at 8; *see also* JEREMY D. MORLEY, *THE HAGUE ABDUCTION CONVENTION: PRACTICAL ISSUES AND PROCEDURES FOR FAMILY LAWYERS* § 1.02 (American Bar Association 2012) (“The required assumption is that the custody determination made by the country of the child’s habitual residence would be the same as that of the refuge country. Some scholars argue that although all courts vow that the determination is based on the ‘best interests of the child,’ there is often a lack of uniformity. These concerns beg the question of whether The Hague Convention is truly solely jurisdictional in nature, or whether in its attempt to stay out of the realm of determining the underlying merits of a custody battle, The Hague Convention in fact disrupts uniformity.”).

11. *See The Hague Convention*, *supra* note 5, at art. 12.

12. *See* MORLEY, *supra* note 10, § 1.04.

agreement among member nations<sup>13</sup> to disallow international kidnapping as a means of forum shopping for a more sympathetic court, calling instead for the return of children to their home country for determinations of custody.

Article 6 of the Hague Convention vests responsibility for the enforcement of protections afforded by the Hague Convention within the borders of each contracting state in that state's Central Authority.<sup>14</sup> A contracting state's Central Authority has the following responsibilities:

discover[ing] the whereabouts of a child who has been wrongfully removed or retained; . . . initiat[ing] or facilitat[ing] the institution of judicial or administrative proceedings with a view to obtaining the return of the child, and, in a proper case, mak[ing] arrangements for organising or securing the effective exercise of rights of access; . . . [and] provid[ing] or facilitat[ing] the provision of legal aid and advice.<sup>15</sup>

The forty-five Articles of the Hague Convention attempt to mitigate the negative impact of international abduction on child victims by providing for two possible remedies in each of its eighty-nine contracting states: an Order for Return of the Child, addressed in Article 12, and an Order Enforcing Access Rights (i.e. visitation rights), addressed in Article 21.<sup>16</sup>

### 1. Order for Return of the Child

The most publicized and widely known aspect of the Hague Convention is its grant of authority to administrative and judicial officials to order the return of children to their home country if wrongfully removed from that country or wrongfully retained in another contracting nation. The Hague Convention directs claims for securing the return of a child to the Central Authority of the country of the child's

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13. MORLEY, *supra* note 10, § 1.09.

To institute a case under the Hague Convention, the petitioner must, as a threshold issue, establish that the Convention was in force at the time of the alleged wrongful removal or wrongful retention in both the country of the child's "habitual residence" as well as in the country in which the child is currently located. Although the Hague Convention has eighty-nine member nations, the Hague Convention is not necessarily in force between two given member nations, as some states have not accepted the accessions of other contracting states. If a state from which a child is taken is not found to be the child's habitual residence, the return remedy of the Convention is not available.

*Id.*

14. The Hague Convention, *supra* note 5, at art. 6.

15. *Id.* at arts. 7(a), (f), (g).

16. *See id.* at arts. 12, 21.

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habitual residence<sup>17</sup> and requires that Central Authority to immediately transmit the petition to the Central Authority of the contracting state in which the child is believed to be located.<sup>18</sup> The Central Authority of the refuge country must then “take . . . all appropriate measures in order to obtain the voluntary return of the child.”<sup>19</sup> If the child is not returned voluntarily, the petitioning parent may initiate judicial or administrative proceedings in the refuge county.<sup>20</sup>

Pursuant to Article 12 of the Hague Convention, the judicial or administrative authority of the refuge country is required to make certain findings before issuing an order for the return of a child. These findings include determining that the child has been “wrongfully removed”<sup>21</sup> and that “a period of less than one year has elapsed from the date of the wrongful removal or retention.”<sup>22</sup> If more than one year has lapsed, the judicial or administrative authority should still order the return of the child unless the child is “now settled in its new environment.”<sup>23</sup>

The Hague Convention provides the parent who removed the child, referred to as the “respondent parent,” with several avenues to challenge the petition for return of the child, even if the child was wrongfully removed or retained under the Hague Convention.<sup>24</sup> If the child is at

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17. *Id.* at art. 8 (“Any person, institution, or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child’s habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child.”).

18. *Id.* at art. 9 (“If the Central Authority which receives an application referred to in Article 8 has reason to believe that the child is in another Contracting State, it shall directly and without delay transmit the application to the Central Authority of that Contracting State and inform the requesting Central Authority, or the applicant, as the case may be.”).

19. *Id.* at art. 10 (“The Central Authority of the State where the child is shall take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child.”).

20. *See id.* at art. 11 (“The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children. If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay.”).

21. Article 3 of the Hague Convention defines a removal or retention of a child as “wrongful” if “it is in breach of rights of custody attributed to a person . . . under the law of the State in which the child was habitually resident immediately before the removal or retention,” and “at the time of the removal or retention those rights were actually exercised . . . or would have been so exercised but for the removal or retention.” *Id.* at art. 3.

22. *Id.* at art. 12 (“[A]t the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention . . .”).

23. *Id.* at art. 12 (“The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year . . . shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.”).

24. *See Pérez-Vera Report, supra* note 6, ¶¶ 27–34.

least sixteen years old, the Hague Convention ceases to apply.<sup>25</sup> Furthermore, if the authority finds that the child is sufficiently mature and of an appropriate age, the authority may consider the child's wishes regarding the petition for return.<sup>26</sup> The Hague Convention also provides for a human rights exception, which allows the authority to refuse to return the child if doing so would violate "fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms."<sup>27</sup>

Finally, the Hague Convention provides for two affirmative defenses that, if proven by the parent opposing the return order, allow the authority to use its discretion in ordering the return of the child.<sup>28</sup> First, the respondent parent may seek to prove that the petitioner parent was "not actually exercising the custody rights at the time of the removal or retention, or has consented to or subsequently acquiesced in the removal or retention."<sup>29</sup> Second, if the respondent parent can convince the authority that "there is a grave risk that [the child's] return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation," the authority is not obligated to order the return of the child.<sup>30</sup>

## 2. Order to Enforce Rights of Access

In addition to protecting the rights of custodial parents through the Hague Convention's return of the child remedy, the drafters also set out to protect the rights of noncustodial parents through the enforcement of rights of access,<sup>31</sup> defined as "the right[s] to take a child for a limited period of time to a place other than the child's habitual residence."<sup>32</sup>

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25. The Hague Convention, *supra* note 5, at art. 4 ("The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.").

26. *Id.* at art. 13 ("The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.").

27. *Id.* at art. 20 ("The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.").

28. *Id.* at art. 13 ("Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that . . .").

29. *Id.* at art. 13(a).

30. *Id.* at art. 13(b). For a full discussion of the "grave risk of harm" exception, see Theresa A. Spinillo, *The Hague Convention on the Civil Aspect of International Child Abduction: An Analysis of the Grave Risk of Harm Defense*, 14 N.Y. INT'L L. REV. 129 (2001).

31. See The Hague Convention, *supra* note 5, at arts. 7(f) and 21 (providing that Central Authority entities should remove barriers to effective access rights of noncustodial parents).

32. *Id.* at art. 5(b).

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Although the Hague Convention directs that “[a]n application to make arrangements for organising or securing the effective exercise of rights of access may be presented to the Central Authorities of the Contracting States in the same way as an application for the return of a child,”<sup>33</sup> parents seeking to enforce access rights do not have the return of the child remedy at their disposal.<sup>34</sup> This is true even if a “left-behind” parent had access rights in the home country, because the return of the child remedy is available only if the removal or retention of the child is deemed “wrongful,” and removal or retention is “wrongful” only if it is a breach of custody rights.<sup>35</sup>

Rights of access are governed by Article 21 of the Hague Convention, which states in its entirety:

An application to make arrangements for organising or securing the effective exercise of rights of access may be presented to the Central Authorities of the Contracting States in the same way as an application for the return of a child. The Central Authorities are bound by the obligations of co-operation which are set forth in Article 7 to promote the peaceful enjoyment of access rights and the fulfilment of any conditions to which the exercise of those rights may be subject. The Central Authorities shall take steps to remove, as far as possible, all obstacles to the exercise of such rights. The Central Authorities, either directly or through intermediaries, may initiate or assist in the institution of proceedings with a view to organising or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject.<sup>36</sup>

Unfortunately, the vague language of Article 21 has led to contradictory enforcement procedures among contracting states. Whereas the provisions governing the return remedy explain the judicial proceedings in adequate detail, Article 21’s language is ambiguous as to the judicial enforcement of access rights. The language permits some countries to interpret Article 21 as granting broad discretion in styling judicial enforcement of rights of access while other countries have instead interpreted the lack of explicit judicial authority as providing a

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33. *Id.* at art. 21.

34. Linda Silberman, *Hague International Child Abduction Convention: A Progress Report*, 57 LAW & CONTEMP. PROBS. 209, 247–48 (1994).

35. The Hague Convention defines “custody rights” as “rights relating to the care of the person of the child and, in particular, the right to determine the child’s place of residence.” The Hague Convention, *supra* note 5, at art. 5(a). In contrast, the Hague Convention defines “access rights” as “the right to take a child for a limited period of time to a place other than the child’s habitual residence.” *Id.* at art. 5(b). A court applying the Hague Convention has to analyze whether the order set forth by the country of the child’s habitual residence qualifies as granting “custody rights” pursuant to the Hague Convention.

36. *Id.* at art. 21.



judicial remedy within their nation.<sup>37</sup>

Aside from the plain language of Article 21, the only guidance available regarding the scope of judicial authority is in the legislative history of the Hague Convention, which makes clear that the Hague Convention should not be read as authorizing courts to decide the merits of any custody issue.

*B. Enforcement of the Hague Convention's Guarantee of Rights of Access in the United States: The International Child Abduction Remedies Act (ICARA) and Rights of Access*

In April 1988, upon recognition that “[i]nternational abductions and retentions of children [were] increasing, and [that] only concerted cooperation pursuant to an international agreement [could] effectively combat this problem,”<sup>38</sup> Congress adopted the Hague Convention, implemented by the International Child Abduction Remedies Act (ICARA)<sup>39</sup> and named the U.S. Department of State as the Central Authority.<sup>40</sup> Although ICARA adds little by way of substance, it directly incorporates all provisions of the Hague Convention and functions to enforce the legal rights and procedures established by the treaty, specifically “the prompt return of children who have been wrongfully removed or retained, as well as . . . securing the exercise of visitation rights.”<sup>41</sup> ICARA defines the rights of access addressed under the Hague Convention as “visitation rights.”<sup>42</sup>

Because the Hague Convention does not dictate the jurisdictional framework for the resolution of access cases in the contracting states, the jurisdictional provisions in ICARA are at the center of the issue addressed in this Casenote. ICARA explicitly states that its purpose is “to establish procedures for the implementation of the Convention in the United States”<sup>43</sup> and that ICARA should be construed as being “in addition to and not in lieu of the provisions of the [Hague]

37. See MORLEY, *supra* note 10, § 1.10.

38. 42 U.S.C. § 11601(a)(3) (2013).

39. ICARA was explicitly enacted to implement the Hague Convention. See International Child Abduction Remedies Act, 42 U.S.C. § 11601(b)(1) (2012) (“It is the purpose of this chapter to establish procedures for the implementation of the Convention in the United States.”).

40. Exec. Order No. 12648, 53 Fed. Reg. 30637 (Aug. 11, 1988) (“The Department of State is hereby designated as the Central Authority of the United States for purposes of the Hague Convention on the Civil Aspects of International Child Abduction. The Secretary of State is hereby authorized and empowered, in accordance with such regulations as he may prescribe, to perform all lawful acts that may be necessary and proper in order to execute the functions of the Central Authority in a timely and efficient manner.”).

41. 42 U.S.C. § 11601(a)(4) (2012).

42. *Id.* § 11602(7).

43. *Id.* § 11601(b)(1).

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Convention.”<sup>44</sup>

ICARA specifically states in 42 U.S.C. § 11603(b) that:

Any person seeking to initiate judicial proceedings under the Convention for the return of a child or for arrangements for organizing or securing the effective *exercise of rights of access* to a child may do so by *commencing a civil action* by filing a petition for relief sought *in any court which has jurisdiction of such action* and which is authorized to exercise its jurisdiction in the place where the child is located at the time the petition is filed.<sup>45</sup>

Furthermore, 42 U.S.C. § 11603(a) states that “[t]he courts of the States and the United States district courts shall have concurrent original jurisdiction of actions *arising under the Convention*.”<sup>46</sup>

Some scholars argue that these provisions create a judicial remedy for the enforcement of all rights protected by the Hague Convention, including access rights.<sup>47</sup> Proponents of this idea focus on the explicit language in the statute referring to the “exercise of rights of access.”<sup>48</sup> Opponents argue that Congress intentionally declined to provide a private right of action to enforce rights of access.<sup>49</sup> They argue that Article 21 of the Hague Convention does not provide a judicial remedy for rights of access; therefore, ICARA’s grant of jurisdiction cannot create a private right of action in access cases because the action does not “aris[e] under the Convention.”<sup>50</sup>

This Casenote analyzes these competing interpretations and questions whether a noncustodial parent seeking to enforce rights of access has a private right of action under ICARA or whether the parent must resort to filing a separate lawsuit in state court pursuant to state family law instead of federal law.

In support of their respective interpretations, both proponents and opponents of a federal right of action in access cases proffer ICARA’s legislative history as evidence that Congress shared their understanding of ICARA’s provisions. Unfortunately, ICARA’s legislative history, much like the legislative history of the Hague Convention, reveals only that Congress intended not to grant U.S. courts any authority to consider the underlying merits of custody disputes.<sup>51</sup>

Also commonly referenced in this debate is a 1986 State Department

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44. *Id.* § 11601(b)(2).

45. *Id.* § 11603(b) (emphasis added).

46. *Id.* § 11603(a) (emphasis added).

47. *See Ozaltin v. Ozaltin*, 708 F.3d 355 (2d Cir. 2013).

48. *Id.* at 372.

49. *See Cantor v. Cohen*, 442 F.3d 196 (4th Cir. 2006).

50. *Id.* at 200.

51. *See id.* at 202–04.

Notice issued after President Reagan submitted the Hague Convention to the U.S. Senate and recommended ratification.<sup>52</sup> Following an explanation of the order for the return of the child remedy, the Notice stated that

“[a]ccess rights,” which are synonymous with “visitation rights,” are also protected by the Convention, but to a lesser extent than custody rights. While the Convention preamble and Article 1(b) articulate the Convention objective of ensuring that rights of access under the law of one state are respected in other Contracting States, the remedies for breach of access rights . . . do not include the return remedy provided for in Article 12.<sup>53</sup>

The competing interpretations among U.S. scholars regarding ICARA’s grant of judicial authority in rights of access cases recently came to the forefront when the Second Circuit Court of Appeals decided *Ozaltin v. Ozaltin* and held that federal courts have subject matter jurisdiction to hear access cases.<sup>54</sup> This decision conflicts with the Fourth Circuit’s holding in *Cantor v. Cohen* that federal courts do not have subject matter jurisdiction to hear access cases because ICARA does not provide a private right of action to parents seeking to enforce access rights.<sup>55</sup>

### III. THE CIRCUIT SPLIT

#### A. The Fourth Circuit and *Cantor v. Cohen*

In *Cantor v. Cohen*, the U.S. Court of Appeals for the Fourth Circuit affirmed a district court’s dismissal of a mother’s action seeking access to her minor children on the grounds that ICARA does not provide a federal right of action for access claims.<sup>56</sup>

Sarah Claudia Aragon Cantor and Andrew Cohen married in Israel in April 1990.<sup>57</sup> The couple had four children together: two girls, R.C. and A.C., and two boys I.C. and Y.C.<sup>58</sup> Ms. Cantor and Mr. Cohen divorced in July 1998 in an Israeli Rabbinical Court, and the accompanying divorce decree provided that Ms. Cantor would have custody of the two younger children, Y.C. and R.C., while Mr. Cohen would have custody

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52. Department of State Text and Legal Analysis of Hague Convention, 51 Fed. Reg. 10494-01 (Mar. 26, 1986).

53. *Id.*

54. *Ozaltin v. Ozaltin*, 708 F.3d 355, 378 (2d Cir. 2013).

55. *Cantor*, 442 F.3d at 206.

56. *Id.* at 197.

57. *Id.*

58. *Id.*

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of the two older children, A.C. and I.C.<sup>59</sup>

In September 1998, the parties determined that Ms. Cantor should have custody of their two daughters and that Mr. Cohen should have custody of their two sons.<sup>60</sup> Pursuant to this agreement, Ms. Cantor relinquished her custody of Y.C. and retained custody of A.C.<sup>61</sup> In June 1999, Ms. Cantor initiated proceedings in the Israeli Rabbinical Court to modify the parties' divorce decree accordingly.<sup>62</sup> In the meantime, just one month later in July 1999, Mr. Cohen joined the U.S. Air Force Chaplaincy as an ordained Rabbi and was scheduled to attend training for the new position in the United States.<sup>63</sup> The Israeli Rabbinical Court issued the second divorce decree in January 2000, granting Ms. Cantor custody of their daughters and Mr. Cohen custody of their sons.<sup>64</sup> Under the second decree, Ms. Cantor also retained temporary custody of their sons while Mr. Cohen attended training in the United States for approximately nine months.<sup>65</sup>

In July 2002, the Israeli Rabbinical Court issued a third divorce decree, which provided that although both parties would retain custody of their children of the same gender, A.C., one of their daughters, would reside "on an extended visit" with her brothers and Mr. Cohen in Germany while he was stationed there with the U.S. Air Force.<sup>66</sup> The third decree provided that Mr. Cohen would pay half of Ms. Cantor's travel expenses to Germany approximately once every two months for her to visit with Y.C., I.C., and A.C.<sup>67</sup> Mr. Cohen was also required to bring the children to Israel at least twice a year and to allow the children to contact Ms. Cohen by phone three times per week.<sup>68</sup> Importantly, the decree did not relinquish custody of A.C. to Mr. Cohen, nor did it provide a return date to Israel for A.C.<sup>69</sup>

By December 2002, both R.C. and Ms. Cantor were dissatisfied with R.C.'s current school, and Ms. Cantor and Mr. Cohen agreed that R.C., the only child remaining in Israel with Ms. Cantor, would thrive in Germany with her siblings and Mr. Cohen.<sup>70</sup> R.C. moved to Germany to

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59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at 197–98.

67. *Id.* at 198.

68. *Id.*

69. *Id.*

70. *Id.*

live with her siblings and her father.<sup>71</sup>

After completing his duty in Germany in April 2004, Mr. Cohen reported back to the United States.<sup>72</sup> In July 2004, all four children moved with Mr. Cohen to Silver Spring, Maryland.<sup>73</sup>

Ms. Cantor, who remained in Israel, filed a verified petition for return of the children and for access to the children in October 2004 in the U.S.<sup>74</sup> Mr. Cohen filed a motion to dismiss, and the district court dismissed the complaint to the extent that it requested access to the children, finding that the court lacked jurisdiction to hear access claims relating to I.C. and Y.C., the parties' sons of whom Mr. Cohen retained custody.<sup>75</sup> Ms. Cantor then filed a motion for final judgment under Federal Rule of Civil Procedure 54(b) on the access claims and for clarification of the access claim as to A.C., of whom she retained custody.<sup>76</sup> The district court granted her motion and certified as a final judgment its dismissal of all access claims, including as to A.C.<sup>77</sup>

Ms. Cantor appealed, and the Fourth Circuit affirmed, in a 2–1 decision,<sup>78</sup> the district court's dismissal of the access claims, finding that ICARA only lends jurisdiction to U.S. courts to determine rights afforded by the Hague Convention, which, the court found, does not provide for a judicial remedy for denial of access rights.<sup>79</sup> The court reached this conclusion by relying on the language of 42 U.S.C. § 11601(b)(4), which states that "[t]he Convention and this chapter empower courts in the United States to determine only rights under the Convention . . . ."<sup>80</sup> The court found that those "rights under the Convention," do not include "presentation to a judicial authority" in Article 21 right of access cases.<sup>81</sup> Article 21's lack of language for a judicial remedy stands in contrast, the court noted, to Article 12's explicit grant of judicial authority in wrongful removal or retention cases.<sup>82</sup>

Furthermore, the court emphasized that where ICARA and Articles 12, 13, and 20 of the Hague Convention offer affirmative defenses for courts to consider in wrongful removal cases, none are explicitly

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71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. For a more in-depth discussion of Judge Traxler's dissent, see *infra* Part IV.B.

79. *Cantor*, 442 F.3d at 206.

80. *Id.* at 199 (quoting 42 U.S.C. § 11601(b)(4) (2013)).

81. *Id.* at 200.

82. *Id.*

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presented in Article 21.<sup>83</sup> The court remarked that “[i]t is difficult to believe that federal courts could entertain access claims, yet would be left powerless to consider any defenses which concern the safety or the best interests of a child.”<sup>84</sup> Therefore, the court concluded that Congress did not intend to provide a federal right of action in Article 21 access cases.

In addition to the plain language interpretation proffered by the court, the court presented additional support for its holding based on the legislative history of ICARA and on general policy arguments against the fitness of federal courts to decide child custody disputes. The court quoted portions of the transcript from the House floor that offered further proof that ICARA was intended to protect only the rights provided for by the Hague Convention and does not extend to any “underlying custody disputes.”<sup>85</sup> The court attempted to show that Congress’s intent was to avoid custody disputes “embroil[ing] the federal courts.”<sup>86</sup> Furthermore, the court noted that “federal courts are courts of limited jurisdiction and generally abstain from hearing child custody matters” and that except for the explicit grant of authority by ICARA over wrongful removal and return cases, “other child custody matters, including access claims, would be better handled by the state courts which have the experience to deal with this specific area of the law.”<sup>87</sup>

Finally, the court observed that Ms. Cantor was not without remedy.<sup>88</sup> Ms. Cantor could have attempted to enforce her access rights under ICARA by initiating administrative proceedings with the U.S. Department of State or under Maryland visitation law by filing suit in Maryland state court.<sup>89</sup>

### *B. The Second Circuit in Ozaltin v. Ozaltin*

In *Ozaltin v. Ozaltin*, Mr. Nurretin Ozaltin sought the return of his two minor children to Turkey from New York, where the children were living with their mother, Ms. Zeynep Tekiner Ozaltin, and sought

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83. *Id.* at 204.

84. *Id.*

85. *Id.* at 202–05.

86. *Id.* at 202.

87. *Id.* at 202.

88. *Id.* at 206. Note also that the Hague Convention provides courts with authority to direct the person who removed or retained the child, or who prevented the exercise of rights of access, to pay necessary expenses incurred by or on behalf of the applicant, including travel expenses, any costs incurred or payments made for locating the child, the costs of legal representation of the applicant, and those of returning the child. The Hague Convention, *supra* note 5, at art. 26.

89. *Cantor*, 442 F.3d at 206.

enforcement of his access rights while the children remained in New York pending the proceedings for their return.<sup>90</sup>

Mr. and Ms. Ozaltin married in 2001 and had two daughters, S.E.O. and Y.O., ages nine and seven respectively at the time of Ms. Ozaltin's appeal to the Second Circuit.<sup>91</sup> Both parents and both children were dual citizens of Turkey and the United States.<sup>92</sup> Ms. Ozaltin contended that in December 2010, she and Mr. Ozaltin had an argument stemming from his alleged drinking problem during which Mr. Ozaltin threatened Ms. Ozaltin and ordered her to leave with the children.<sup>93</sup> Ms. Ozaltin quickly travelled with the children to New York, where they stayed with her family.<sup>94</sup> Ms. Ozaltin claimed that she spoke with Mr. Ozaltin during a layover on their trip and that he told her to remain in the United States with the children.<sup>95</sup>

Mr. Ozaltin filed an application with the Turkish Ministry of Justice in early January 2011 seeking the return of the parties' daughters to Turkey under the Hague Convention.<sup>96</sup> Ms. Ozaltin filed an *ex parte* application with the Second Family Court in Usk Dar, resulting in a court protective order barring Mr. Ozaltin from "threatening or disturbing [Ms. Ozaltin] and the children."<sup>97</sup> Ms. Ozaltin initiated divorce proceedings with the Turkish court in early February 2011, and the court's temporary orders required Mr. Ozaltin to make spousal support payments to Ms. Ozaltin.<sup>98</sup>

In May 2011, Mr. Ozaltin petitioned the Turkish court for temporary custody or, in the alternative, for an order requiring the children's return to Turkey and the rights to access his daughters in the meantime.<sup>99</sup> The court rejected Mr. Ozaltin's petition for custody but awarded him "possession of the children from 10 am on Saturdays until 12 pm on Sundays every first and third weeks of the month if he goes to the USA."<sup>100</sup> Mr. Ozaltin travelled to New York and exercised these rights of access between May and August 2011.<sup>101</sup> In July 2011, the Turkish court ordered that Mr. Ozaltin was permitted to exercise extended parenting time with the children outside of the United States from

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90. *Ozaltin v. Ozaltin*, 708 F.3d 355, 357 (2d Cir. 2013).

91. *Id.* at 360.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at 360–61.

98. *Id.* at 361.

99. *Id.*

100. *Id.*

101. *Id.*

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August 18, 2011 until September 1, 2011.<sup>102</sup>

After flying his daughters back to Turkey on August 28, 2011, Mr. Ozaltin petitioned the Turkish court to extend his parenting time for one month.<sup>103</sup> The court denied Mr. Ozaltin's request, but he retained physical custody of the children nevertheless.<sup>104</sup> After finding that Mr. Ozaltin had "acted in bad faith," the Turkish court issued two orders demanding that Mr. Ozaltin return the children and their passports to Ms. Ozaltin.<sup>105</sup> Mr. Ozaltin finally returned the children to Ms. Ozaltin, who had since travelled to Turkey, on September 18, 2011.<sup>106</sup> Ms. Ozaltin could not immediately return to New York with her children because Mr. Ozaltin had apparently lost the children's passports, but they finally returned to New York on November 4, 2011.<sup>107</sup>

Ms. Ozaltin denied Mr. Ozaltin any access to the children once she returned to New York.<sup>108</sup> In March 2012, the Turkish court rejected a second request by Mr. Ozaltin for temporary custody but again ordered that Ms. Ozaltin permit his weekend visitations with the children.<sup>109</sup>

Mr. Ozaltin next instituted proceedings in the U.S. District Court for the Southern District of New York pursuant to ICARA and the Hague Convention, seeking an order enforcing his rights of access under Article 21, an order for the return of the children to Turkey under Article 12, and a cost award under Article 26.<sup>110</sup> The district court ordered that Ms. Ozaltin permit Mr. Ozaltin the rights of access ordered by the Turkish court, that the children remain in the state of New York during the pendency of the proceedings and that the children's U.S. passports be surrendered to the court.<sup>111</sup>

The district court held two hearings, at which both parents presented extensive evidence and offered testimony of Turkish legal experts.<sup>112</sup> In June 2012, the district court found that the removal of the children from Turkey was wrongful and ordered their return at the conclusion of the school year.<sup>113</sup> The order also awarded Mr. Ozaltin "any 'necessary expenses' incurred in connection with the suit."<sup>114</sup> In the interim, the

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102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at 362.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 363.

113. *Id.* at 364.

114. *Id.* at 365.



district court ordered Ms. Ozaltin to comply with the Turkish court's order granting Mr. Ozaltin rights of access despite her contention that the district court lacked jurisdiction over access claims under ICARA.<sup>115</sup>

Ms. Ozaltin appealed the district court's visitation order and costs award on grounds that the district court lacked subject matter jurisdiction over ICARA claims seeking to enforce rights of access.<sup>116</sup> Ms. Ozaltin argued that Article 21 of the Hague Convention makes no mention of judicial remedies, and thus, judicial remedies are unavailable under ICARA.<sup>117</sup>

The Second Circuit affirmed the district court's finding that federal courts have subject matter jurisdiction over claims seeking to enforce rights of access under ICARA.<sup>118</sup> As support for its decision, the court maintained that "[t]he statutory basis for a federal right of action" in these cases "could hardly be clearer."<sup>119</sup> The court read ICARA to "straightforwardly establish that a petitioner may 'initiate judicial proceedings under the Convention . . . for organizing or securing the effective exercise of rights of access to a child,' and that 'United States district courts shall have concurrent original jurisdiction' over such actions."<sup>120</sup>

The court distinguished its analysis from *Cantor*, explaining that the *Cantor* court read Article 21 to say that "access rights can only be vindicated by applying to The State Department," without attention to the use of the word "may."<sup>121</sup> In rejecting this approach, the court emphasized Article 29 of the Hague Convention, which reveals the drafters' intention that the Central Authority remedy be nonexclusive in nature:

This Convention shall not preclude any person . . . who claims that there has been a breach of custody or access rights within the meaning of Article 3 or 21 from applying directly to the judicial or administrative authorities of a Contracting State, whether or not under the provisions of this Convention.<sup>122</sup>

As further evidence that Congress never intended ICARA to restrict these claims to administrative actions pursued through the Central Authority, the court pointed out that the member countries' Central

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115. *Id.*

116. *Id.* at 365–66.

117. *Id.* at 366.

118. *Id.* at 378.

119. *Id.* at 372.

120. *Id.* (quoting 42 U.S.C. § 11603(a) (2013)).

121. *Id.* at 373.

122. *Id.* (quoting The Hague Convention, *supra* note 5, at art. 29).

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Authority offices are not equipped to enforce rights of access.<sup>123</sup> The Central Authority is intended to offer “facilitative services,” including helping to locate the child, assisting with initiation of judicial or administrative proceedings, and identifying proper counsel in the relevant jurisdiction.<sup>124</sup> The U.S. State Department, for example, lacks any independent power to enforce access rights.<sup>125</sup>

For these reasons, the court held, in contrast with the Fourth Circuit’s decision in *Cantor v. Cohen*, that Article 21 does not mandate that efforts to secure the right of access may be pursued only via application to the member country’s Central Authority, because the “facilitative role that Central Authorities assume . . . does not displace or inhibit the ability of a party to vindicate his or her rights directly in federal or state court under § 11603(b).”<sup>126</sup>

The court acknowledged criticism that Article 21 of the Hague Convention lacks sufficient enforcement power.<sup>127</sup> The court responded by stating that even if a judicial remedy for enforcing rights of access is not required by Article 21, ICARA unambiguously creates a judicial remedy, which is not inconsistent with the Hague Convention.<sup>128</sup>

#### IV. DISCUSSION

##### *A. Statutory Interpretation*

Although *Cantor*’s strict plain language interpretation of ICARA has gained some support as a wise policy decision that will reduce federal court caseloads, the *Cantor* approach fails to account for ICARA’s explicit grant of judicial authority and for the spirit of both ICARA and its implementing treaty, the Hague Convention.

The language of Article 21 and the Hague Convention in general is admittedly vague as to particular remedies available in access cases, and many contracting states have acknowledged this ambiguity. It was perhaps the intent of the Convention’s drafters to leave enforcement of access rights to the various levels of the contracting states’ legal systems. Nonetheless, any lack of clarity with respect to access cases under the Hague Convention should not present an obstacle to parents seeking to enforce rights of access in the United States. Rights of access cases brought in the U.S. are initiated pursuant to ICARA, and therefore,

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123. *Id.*

124. *Id.*

125. *Id.* at 373–74.

126. *Id.* at 374.

127. *Id.*

128. *Id.*

the statutory authority governing these claims is 42 U.S.C. § 11601, *et seq.*, not Article 21 of the Hague Convention. This is not to say that the spirit of the Hague Convention is irrelevant or unimportant to this analysis but only to point out that the ambiguous jurisdictional language of the Hague Convention need not muddle the clear-cut jurisdictional grants in ICARA.

ICARA explicitly states that

[a]ny person seeking to initiate judicial proceedings under the Convention for . . . arrangements for organizing or securing the effective exercise of rights of access to a child may do so by commencing a civil action by filing a petition . . . in any court which has jurisdiction . . . .<sup>129</sup>

In the face of this unambiguous statutory language, which clearly creates a private right of action, proponents of the *Cantor* approach argue that another provision of ICARA forecloses a judicial remedy in access cases. Section 11603(a) reads, “[t]he courts of the States and the United States district courts shall have concurrent original jurisdiction of actions arising under the Convention.”<sup>130</sup> They argue that because the Hague Convention does not explicitly create a judicial remedy for Article 21 access cases and because ICARA purports to provide a private right of action only for those actions “arising under the Convention,” parents seeking to enforce rights of access in the U.S. have no judicial remedy under ICARA.

This argument conflates *remedies* provided for by the Hague Convention with *rights* that the Hague Convention protects. Although the Hague Convention arguably does not create a private right of action in access cases, the Hague Convention unquestionably protects rights of access. In fact, Article 1 of the Hague Convention identifies as a purpose “to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.”<sup>131</sup> Consequently, ICARA’s grant of a private right of action in access cases is not inconsistent with § 11603(a) because rights of access are explicitly protected by the Hague Convention. Furthermore, proponents of the *Cantor* approach fail to consider the ICARA provision stating that ICARA should be read “in addition to and not in lieu of the provisions of the Convention.”<sup>132</sup>

Not only is a private right of action in access cases not prohibited by ICARA, it is specifically provided for throughout the various provisions. Section 11603(b) is entitled “judicial remedies,” and § 11603(e)(1)(B)

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129. 42 U.S.C. § 11603(b) (2013).

130. 42 U.S.C. § 11603(a) (2013).

131. The Hague Convention, *supra* note 5, at art. 1.

132. 42 U.S.C. § 11601(b)(2) (2013).

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provides for a burden of proof provision specific to petitioners seeking to enforce access rights:

A petitioner in an action brought under [ICARA based on authority from The Hague Convention] shall establish by a preponderance of the evidence . . . in the case of an action for arrangements for organizing or securing the effective exercise of rights of access, that the petitioner has such rights.<sup>133</sup>

Proponents of the *Cantor* approach next argue that even if ICARA may provide a private right of action, Congress did not intend for ICARA to staunchly protect rights of access. In support of this argument, they point to the “low” placement of the enforcement of access rights in the fourth subparagraph of ICARA’s “Findings” section. This argument is not persuasive, however, because it fails to explain the substance of the preceding provisions. None of the first three subsections of § 11601(a) identifies any of the protected rights, but instead, they explain why Congress believed legislation of this nature was necessary in the first place:

(1) [t]he international abduction or wrongful retention of children is harmful to their well-being; (2) [p]ersons should not be permitted to obtain custody of children by virtue of their wrongful removal or retention; [and] (3) [i]nternational abductions and retentions of children are increasing, and only concerted cooperation pursuant to an international agreement can effectively combat this problem.<sup>134</sup>

The fourth subsection of § 11601(a) identifies both remedies available under ICARA: the return of children who are wrongfully removed or retained and the enforcement of rights of access for noncustodial parents where visitation is denied by the custodial parent.

As further support for the proposition that Congress did not intend to allow courts to enforce access rights under ICARA, proponents of the *Cantor* approach cite to the U.S. State Department’s 1986 Notice which stated that rights of access “are also protected by the Convention, but to a lesser extent than custody rights,”<sup>135</sup> and that “the remedies for breach of access rights . . . do not include the return remedy provided for in Article 12.”<sup>136</sup>

Proponents of the *Cantor* approach are correct in suggesting that the return of the child order is the ICARA remedy with the “most teeth” and that a denial of rights of access is not generally grounds for a return

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133. 42 U.S.C. § 11603(e)(1)(B) (2013).

134. 42 U.S.C. § 11601(a)(1)–(3) (2013).

135. Department of State Legal Analysis of Hague Convention, 51 Fed. Reg. 10494-01 (Mar. 26, 1986).

136. *Id.*

order. However, the fact that wrongful removal or retention claims call for the more powerful remedy does not minimize the importance of other rights protected by ICARA. Had Congress wanted to recognize the enforcement of access rights as an aspirational objective but still deprive courts of executing any remedy, it could have easily done so. Instead, Congress repeatedly provided support for a private right of action in rights of access cases.

### *B. Legislative Intent and Custody Determinations*

Proponents of the *Cantor* approach also look to legislative history for support in arguing that Congress did not aim to create a private right of action for parents seeking to enforce rights of access under ICARA. As support, they state, validly, that Congress was strongly opposed to any interpretation of ICARA permitting federal courts to decide the merits of any custody case. The drafters of the Hague Convention were equally clear on this point, rejecting any interpretation of its provisions that would permit contracting states' courts to consider the underlying merits of custody disputes. Most scholars would agree that custody determinations are properly left to a state's family or domestic relations courts, and that the Hague Convention and ICARA call chiefly for *legal* determinations that require as little consideration of the merits of the case as possible.

The *Cantor* proponents' legislative intent argument is unconvincing because it does not explain why rights of access cases "require consideration of the merits of the custody dispute." Instead, the judicial determination required to make the requisite findings to order the enforcement of a parent's rights of access is almost purely legal. The necessary inquiry in access cases is limited to whether "the petitioner has such [access] rights."<sup>137</sup> Put simply, the court must consider only whether a valid, foreign custody order for visitation exists and whether those rights of access are being violated, "not whether the petitioning parent is better suited to serve as custodian."<sup>138</sup> As Justice Traxler remarked in his dissent in *Cantor*, "[t]his limited inquiry does not require federal courts to plumb the depths of family law."<sup>139</sup>

In contrast, U.S. federal courts deciding petitions for the return of a child are required to delve into questions of fact normally reserved for the states' family or domestic relations courts. For example, in deciding a return case, the court must consider, by way of affirmative defenses, whether the child is "well settled" in the U.S. and whether the child may

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137. 42 U.S.C. § 11603(e) (2013).

138. *Cantor v. Cohen*, 442 F.3d 196, 207 (4th Cir. 2006) (Traxler, J., dissenting).

139. *Id.* at 212 (Traxler, J., dissenting).

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suffer a grave risk of harm if returned to its country of habitual residence. In this way, a federal court's decision in return cases is not wholly a legal determination. However, proponents of the *Cantor* approach undoubtedly agree that these findings required in return cases are soundly within the province of the federal courts under the jurisdictional grants in ICARA. By this logic, asking federal courts to decide access cases, which arguably require a more purely legal analysis than return cases, would by no means embroil the federal courts with family law questions, which all agree are best left to state courts.

### *C. Public Policy*

The underlying essence of both the Hague Convention and ICARA is an international, concerted attempt to protect children across the globe from the harmful effects of international child abduction. With increased ease of travel, international marriages, and children with dual citizenship and passports, this problem is not likely to subside on its own. Considering the ruinous effects of tearing a child away from one parent, even if only for a limited time, the United States should adopt the Second Circuit's approach and allow parents who have been denied access to their children, who are located, rightfully or wrongfully, in the United States, the remedy of a private right of action in a U.S. court to enforce their rights of access.

And if the plain language of ICARA and the concerns for the child at the center of such a case are insufficient, providing parents a private right of action to enforce rights of access under ICARA is a sensible and reasonable approach. More often than not, the left-behind parent concurrently seeks a return order and, either in the alternative or during the pendency of the return case, an order enforcing rights of access. To ask parents, most of whom are presumably neither U.S. citizens nor experts of the U.S. legal system, to pursue these remedies in separate courts under separate legal authority would be unreasonable and prohibitive of enforcement of rights of access protected by the Hague Convention and ICARA.

Most importantly, providing parents a private right of action to seek enforcement of their rights of access furthers a primary goal of the Hague Convention—mitigating the harmful effects on children by maintaining the status quo. Depriving the left-behind parent of a nationally uniform avenue to enforce rights of access will inevitably result in longer periods of time during which the child has no contact with the parent. In particular, a left-behind parent's chances of quick resolution are best if that parent initiates the proceedings in federal district court. Federal courts have the resources to operate under a

stricter timeline than the average state domestic relations court. In fact, the Hague Convention requires that courts “act expeditiously in proceedings for the return of children,”<sup>140</sup> and suggests that a court should reach a decision within only six weeks of a petition. Furthermore, federal district court judges are generally better equipped to interpret foreign custody orders and federal law than state court judges.

Related to the goal of minimizing the harmful effects on children entangled in an international custody dispute is the objective of refusing to reward international child abduction by allowing the fleeing parent the benefit of another country’s laws. If a fleeing parent knows that U.S. law will allow the fleeing parent to cut off all communication between the left-behind parent and the child during the course of a return case, the U.S. is perpetuating the problem of international child abduction and is providing an incentive for parents to flee to the U.S. If ICARA’s provisions for securing rights of access are interpreted to have no teeth, then the U.S. is failing to achieve the purposes of the Hague Convention and is abandoning the agreement it made with other contracting states. The U.S. has a very significant interest in the enforcement of its own custody orders abroad and expects that other nations will stand behind these orders. For this international cooperative effort to succeed, the U.S. must follow suit and permit its courts to enforce other nations’ custody orders in the most reasonable and prompt manner, so that fleeing parents will not find a “friendlier forum” in the United States.

## V. CONCLUSION

Although the Hague Convention’s enforcement provisions in rights of access cases are vague and thus may possibly be interpreted as lacking a judicial remedy, the plain language of ICARA unambiguously confers state courts *and* federal courts jurisdiction over ICARA actions, without any distinction between access claims and return claims. The Fourth Circuit’s analysis in *Cantor v. Cohen* fails to sufficiently justify its denial of a private right of action in access cases. In addition to ICARA’s explicit mention of the applicable judicial procedures in access cases, the determinations required to decide access cases are well within the domain of state and federal courts and do not encroach upon the province of state domestic relations courts. Denying the left-behind parent the opportunity to pursue both ICARA remedies concurrently forces that parent to splinter the case into two separate courts. The

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140. The Hague Convention, *supra* note 5, at art. 11.

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*Cantor* approach prohibits the enforcement of rights of access under the Hague Convention—rights that Congress intended to protect in ICARA. Finally, the Second Circuit’s approach in *Ozaltin v. Ozaltin* conforms to the spirit of the Hague Convention. Providing a private right of action in access cases ensures that U.S. law is not incentivizing parents, dissatisfied with another country’s custody order, to escape the force of that order by fleeing to the United States. Most importantly, if the left-behind parent is able to promptly receive an order enforcing rights of access, the damage to the child’s long-term relationship with both parents can be curtailed. For these important policy reasons as well as for international treaty interpretation issues, the issue of a private right of action, pursuant to ICARA, for rights of access cases is ripe for review by the United States Supreme Court.



